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ALEXANDER L. STEVAS,

No. 80-2146

In the Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF FLORIDA, PETITIONER

v.

MARK ROYER

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

The United States will discuss the following questions:

1. Whether respondent had been effectively arrested when he accompanied county narcotics officers from an airline terminal concourse to a nearby office where he agreed to a search of his luggage.

2. Whether respondent was illegally seized when the officers first approached him and asked to speak to him, or during the course of the brief interview which followed.

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INTEREST OF THE UNITED STATES

This case presents questions concerning the legality of procedures utilized by local police officers in an airport surveillance program designed to intercept couriers transporting narcotics through Miami International Airport. That surveillance program is similar to the nationwide airport surveillance program operated by the federal Drug Enforcement Administration (DEA) in order to intercept domestic couriers transporting narcotics between major drug source and distribution centers in the United States. See *United States* v. *Mendenhall*, 446 U.S. 544, 562 (1980) (opinion of Powell, J.). The DEA program is now in operation at more than 20 airports throughout the nation, and is an important and highly successful part of DEA's total drug enforcement effort.

Under the DEA program, trained agents scrutinize arriving and departing passengers on certain flights, looking for characteristics and behavioral traits that, in their collective experience, tend to distinguish drug couriers from ordinary passengers. The DEA and its agents in the field have also developed relatively standard procedures for approaching and questioning individuals suspected of being drug couriers. These procedures generally involve a pattern of investigation similar to that in the present case. Accordingly, the outcome of this

case will have a significant impact upon the viability of DEA's important airport surveillance program and the federal program for enforcement of laws against drug trafficking.[1]

STATEMENT

1. The evidence adduced at the suppression hearing in this case showed that at approximately 12:30 p.m. on January 3, 1978, Dade County plainclothes police officers Johnson and Magdalena were working on narcotics detail at Miami International Airport. Officer Johnson noticed respondent as he waited in line at the ticket counter of National Airlines. The officers observed respondent over a period of 15 to 20 minutes (Tr. 6-7, 9, 11-13, 18).[2] Respondent was pale and appeared to be extremely nervous (Tr. 14-15, 18-19). He kept a close watch on two large and seemingly heavy American Tourister suitcases that he had set down underneath a rope in front of the ticket counter, and continually glanced around as if looking to see whether anyone was paying particular attention to him (*ibid.*). After respondent paid for his ticket in cash from a large roll of bills, he was given two adhesive labels to attach to his suitcases (Tr. 18-21). Respondent wrote the words "Holt" and "La Guardia" on the labels, but did not fill in either an address or phone number in the spaces provided (Tr. 21-22). After checking his two suitcases, respondent

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[1] DEA has devoted considerable effort to training its agents to assure compliance with the evolving outlines of the Fourth Amendment law that governs airport drug surveillance. In this training, the DEA presently employs a comprehensive manual, *Legal Problems in Airport Interceptions of Domestic Drug Couriers* (1980) ("DEA Manual"), that instructs agents on the requirements of the Fourth Amendment. We have lodged copies of this publication with the Clerk for distribution to the Court and provided copies to counsel. Earlier versions of this manual have been in use in DEA training since 1978. *Id.* at 8. Pursuant to 21 U.S.C. 873, the DEA provides training employing these materials to state and local law enforcement personnel as well as federal agents.

[2] "Tr." refers to the transcript of the May 22, 1978, suppression hearing.

proceeded to the concourse leading to the boarding area (Tr. 22-23).

Based on the foregoing observations, which had aroused their suspicions, the two officers approached respondent, identified themselves as police officers, and asked him if he had a moment to talk to them (Tr. 23-24; 38-39). When respondent replied that he did, Officer Johnson asked to see his airline ticket. Respondent produced a one-way ticket to New York in the name "Holt" (Tr. 24). Johnson then asked to see some identification, and respondent produced a New Jersey driver's license bearing the name "Mark Royer" (Tr. 24-25). When asked to explain the discrepancy, respondent stated that a friend had made the reservation for him in the name of "Holt" (Tr. 25). By this time respondent was extremely nervous; his face was pale, his hands were shaking, and he was visibly sweating (*ibid.*).

The officers informed respondent that they were narcotics investigators and that they had reason to suspect he was transporting narcotics (Tr. 26). They asked him to accompany them to a room approximately 40 feet away in order to get out of the general population of the airport (Tr. 26-27).[3] Respondent followed without protest. The officers led respondent to an airline stewardesses' lounge, where a large storage closet along one wall had been converted into a small office used by the police, outfitted with a desk and two chairs (Tr. 27).

Inside the office, one of the officers requested respondent's consent to a search of his suitcase, explaining that he was suspected of carrying narcotics and that a search would either dispel or confirm that suspicion (Tr. 28).[4]

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[3] At the suppression hearing, Officer Johnson explained that the move was made "[f]or the protection of the general public" and to minimize embarrassment to respondent (Tr. 32).

[4] The opinion under review states (Pet. Supp. App. 45) that the officers retrieved the luggage and brought it to the office before requesting respondent's consent to search. However, the record is not entirely clear on this point and could be read to suggest that the sequence was the reverse. See Tr. 28-29, 44-45, 48-49. The trial court made no finding on this point.

Respondent produced a key from his pants' pocket and unlocked one of the suitcases, which Officer Johnson then opened (Tr. 29). As for the second suitcase, which appeared brand new, respondent claimed not to know the combination (Tr. 29, 45). Officer Johnson asked him if he had any objection to their opening that suitcase, and respondent replied, "No, go ahead" (Tr. 29). When Johnson explained that he might have to break the suitcase, respondent stated he had no objection (*ibid.*). Officer Johnson then opened the suitcase with a screwdriver (Tr. 30). Respondent's luggage contained what was later determined to be 65 pounds of marijuana (Tr. 29-30). Respondent was placed under arrest and given *Miranda* warnings (Tr. 33).

Respondent was the only witness besides Officer Johnson to testify at the suppression hearing. Respondent claimed that he had agreed to talk to the officers, had shown them his airline ticket and driver's license, and had accompanied them to their airport office because he felt he had no choice (Tr. 52-54). He explained his cooperation, stating "[T]hey were police officers and I felt that's what I had to do" (Tr. 52).[5] Respondent further testified that when he entered the office the officers asked him to empty his pockets and later "told" him to open up the suitcase with the key he had removed from his pockets.[6] In each instance he complied. He explained that he made no attempt to leave because he "didn't think that was a possibility" (Tr. 57).

2. Respondent argued that he had been placed under arrest because he reasonably believed his liberty constrained, that there was no probable cause to support an arrest, and that his consent to the search was accordingly ineffective (Tr. 66-70). The State argued that the original contact was not even a stop requiring reasonable suspicion (Tr. 71-72), and in the alternative that the

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[5] Officer Johnson had testified that the entire encounter with respondent proceeded in conversational tones and that no physical force or threat was employed (Tr. 32-35).

[6] Officer Johnson testified, however, that respondent was asked to empty his pockets after he was arrested (Tr. 49).

officers had a founded suspicion that respondent was engaged in criminal activity sufficient to support a minimally intrusive investigative detention of limited duration under *Terry* v. *Ohio*, 392 U.S. 1 (1968) (Tr. 72-74).

The trial court denied the motion to suppress from the bench, finding the search conducted to have been reasonable (Tr. 78-79). The court stated (*ibid.*):

> [T]he Court believes that the consent was freely and voluntarily given. By the same token, I think under circumstances such as this where the police officers are in the airport and are surveilling, as testified to by the officer, with a specific profile that they are following, that the officer doesn't have the time to run out and get a search warrant because the plane is going to take off. If there is going to be anything occurring it's going to occur long before they can take any type of action. So it's a denial on dual grounds. Might as well get it tested whether it's reasonable or unreasonable because, I assume you are taking an appeal.[7]

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[7] The trial court did not explicitly address respondent's contention that he had been effectively arrested, or the State's contention that no seizure had transpired or that the encounter was a permissible *Terry* stop. The panel of the appellate court described the trial court's alternative holding as follows: (Pet. Supp. App. 2; footnote omitted):

> [W]ith the defendant fitting the profile of a drug courier and [*sic*] officers had probable cause to believe his luggage contained contraband, justifying a search.

The actual ruling, quoted in the text, does not demand this characterization. Presumably the panel inferred from the lower court's discussion of exigent circumstances that that court had found, *sub silentio*, probable cause supporting a search, and had further found (explicitly) that exigent circumstances excused the absence of a search warrant. But given the State's reliance upon *Terry* v. *Ohio*, it seems more likely that the trial court's true intention was to explain, by tracking loosely this Court's analysis in *Terry*, why neither a warrant nor probable cause is required to limited investigative detention. Thus, it may be that the trial court meant to hold, in conformity with the State's argument, that there was no more than a *Terry* stop here, that it was properly supported by founded and articulable suspicion, and that respondent's consent to the search was accordingly untainted, even if the preceding interview was not entirely consensual.

3. A panel of the District Court of Appeal of Florida, Third District, with one judge dissenting, affirmed (Pet. Supp. App. 1-35). On rehearing, the en banc court reversed the denial of the suppression motion (*id.* at 36-74) and directed dismissal of the charges against respondent (*id.* at 56).

The en banc court held (Pet. Supp. App. 47-50) that respondent had been arrested at the time he consented to the search of his suitcases because he "was 'under [the] reasonable impression that he [was] not free to leave * * *'" (*id.* at 49; citations omitted). In support of the arrest characterization, the court noted that respondent was placed in confined quarters with two policemen, that he had been told of the officers' suspicions, that his plane ticket and luggage had been taken from him,[8] and that the State had conceded at oral argument that respondent would not have been allowed to leave the police office had he attempted to do so (*id.* at 47-48).

The en banc court held the arrest unlawful for lack of probable cause (Pet. Supp. App. 50-53).[9] Respondent's

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[8] The officers had retained respondent's airline ticket as they walked with him from the concourse, where he had produced the ticket in response to the officers' request, to the makeshift office. Before retrieving respondent's luggage, Officer Johnson removed the baggage stubs from respondent's ticket folder, leaving the ticket behind with respondent and Officer Magdalena in the office. (Tr. 41-42, 44, 46).

[9] Because it held that respondent had been arrested, the en banc court declined to decide whether the facts available to the officers, including the discrepancy with respect to respondent's name, would constitute reasonable suspicion sufficient to support a *Terry* stop (Pet. Supp. App. 42-43 n.6, 51-52 & n.11). The court did, however, record its view (*id.* at 51) that "a mere similarity with the contents of the drug courier profile is insufficient even to constitute the articulable suspicion required to justify a *Terry* stop," citing *Reid* v. *Georgia*, 448 U.S. 438 (1980). Notwithstanding its reservation of decision, the court also noted (Pet. Supp. App. 39-41) its view that all of the bases for suspicion cited by the officers to explain the initial contact "are at least equally, and usually far more frequently, consistent with complete innocence" (*id.* at 39a). The court rejected out of hand (*id.* at 40 n.4) Officer Johnson's testimony (Tr. 16-17) that based upon his experience he was generally able to

consent to the search was held to be an unattenuated fruit of the unlawful arrest and therefore to have been involuntary and invalid (*id.* at 53-55). Finally, turning to the trial court's alternate holding, the en banc court declined to decide "whether 'exigent circumstances' are involved in departing airline passenger cases like this one," noting that such circumstances could excuse only the absence of a warrant and not the absence of probable cause to support a search (*id.* at 55-56).[10]

SUMMARY OF ARGUMENT

I

The issue actually decided by the court below is whether respondent was effectively under arrest at the time he consented to the search of his luggage. The decision that he was rests upon the mistaken application to that issue of the test for distinguishing seizures subject to the Fourth Amendment from consensual police-citizen contacts that do not implicate the Fourth Amendment at all. The test used, which turns on whether a reasonable person in respondent's place would have thought himself free to leave, plainly cannot be applied to distinguish investigative detentions from arrests, for both are seizures having that characteristic. Yet an investigative detention is a less intrusive encounter justifiable on the basis of reasonable suspicion falling short of the traditional probable cause standard for arrest.

An investigative detention is distinguishable from an arrest requiring probable cause by reference to the

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distinguish the furtive wariness of a drug courier from the flight anxiety of a "white knuckle airline passenger."

In light of its conclusion that respondent had been unlawfully arrested, the en banc court also reserved decision as to whether he had been "seized" for Fourth Amendment purposes as soon as the officers approached him and asked to speak to him (Pet. Supp. App. 49 n.8).

[10] The en banc court evidently read the trial court's oral opinion as holding that the exigency created by an air traveler's imminent departure was in itself a sufficient predicate for a search, without regard to the existence of probable cause (see Pet. Supp. App. 46-47, 55-56; compare page 5 note 7, *supra*).

limited duration and purpose of the detention. Here, the involuntary detention of respondent, if any there was, was limited to a period of not more than 15 minutes (Tr. 31) and was rigidly circumscribed by the officers' objective to seek respondent's consent to search respondent's luggage. Whether or not consent would be secured, and the results of any search that might be authorized, were matters that would assuredly become known within a short period of time. Thus, respondent's detention falls well within the bounds of a permissible investigative detention, and, unlike the situation in *Dunaway* v. *New York*, 442 U.S. 200 (1979), was entirely different in character from an arrest. None of the factors cited by the court below in support of the arrest characterization justify a contrary conclusion.

II

If this Court finds error in the holding that respondent had been arrested, it may simply remand for consideration of the remaining issues, which were not decided by the court below. The Court may, however, deem it appropriate instead to decide, or afford guidance respecting, the questions whether respondent was unlawfully seized when he was first approached by the police or at some time thereafter.

A. It is our submission, consistent with the views expressed by Justices Stewart and Rehnquist in *United States* v. *Mendenhall*, 446 U.S. 544, 551-557 (1980), that respondent was not seized when he was approached by police and asked for his ticket and identification. Whatever may have been the social or psychological wellsprings of respondent's decision to cooperate with the officers' inquiry, the question whether there was a Fourth Amendment seizure turns not upon those factors but upon the objective behavior of the officers. There is no evidence here of any conduct by the officers that created an objective basis for believing that respondent was not free to terminate the encounter at will.

Alternatively, if the Court concludes that this contact amounted to a seizure, we submit that in light of the

important governmental interest in interdicting interstate commerce in dangerous drugs and the very nominal intrusion involved, the facts known to the officers at the time they approached respondent were sufficient to justify their action.

B. Assuming that respondent was not unlawfully seized in the initial phase of the encounter, there can be no question that strong reasonable suspicion amply justifying an investigative detention quickly developed, for the initial interview alerted police to the fact that respondent was traveling under a false name and that he had lied to them in explaining this conduct. These circumstances plainly sufficed to establish reasonable grounds for the officers' ensuing effort to secure respondent's consent to a search of his luggage.[11]

ARGUMENT

I. RESPONDENT HAD NOT BEEN ARRESTED AT THE TIME HE CONSENTED TO THE SEARCH OF HIS SUITCASES

Because it concluded that respondent's consent was tainted by an unlawful arrest, the court below failed to consider whether or not respondent's consent to the search of his suitcases had correctly been found to be voluntary by the trial court. The en banc appellate court's decision, however, rests upon application of an erroneous standard for determining whether an arrest has occurred.

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[11] Because of the limitations of space applicable to an amicus curiae, and the number of issues presented by this case, we invite the Court's attention to our brief in *Michigan* v. *Summers*, No. 79-1794 (June 22, 1981), pages 9-22, and our brief in *United States* v. *Mendenhall*, *supra*, pages 47-62, wherein we address the distinction between an arrest requiring probable cause and a lesser seizure sustainable on the basis of reasonable suspicion more fully than is possible here. We similarly invite the court's attention to pages 19-26 of our brief in *Mendenhall* addressing the question whether the initial contact with the respondent there was a seizure *vel non*, and pages 26-42, which address the existence of reasonable suspicion at the beginning of that encounter. Copies of these briefs have been provided to counsel.

The test employed was whether respondent "was 'under [the] reasonable impression that he [was] not free to leave the officer's presence'" (Pet. Supp. App. 49; citations omitted). However, this standard governs only the preliminary question whether respondent had been seized at all for Fourth Amendment purposes and does not serve to distinguish an arrest from a less intrusive seizure that need not rest on probable cause. Application of a proper standard looking to the character and purpose of the detention shows that it was not of such a nature as to require probable cause.

1. In a series of decisions commencing with *Terry* v. *Ohio*, 392 U.S. 1 (1968), and including most recently *Michigan* v. *Summers*, No. 79-1794 (June 22, 1981), this Court has affirmed that particular kinds of police conduct of an investigative nature may constitute a "seizure" subject to the constraints of the Fourth Amendment and yet be permissible under the general reasonableness standard dictated by that provision, even in the absence of probable cause. See also *United States* v. *Martinez-Fuerte*, 428 U.S. 543 (1976); *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 882-884 (1975); *Adams* v. *Williams*, 407 U.S. 143 (1972). At the same time, the Court has recognized that

> [N]ot all personal intercourse between policemen and citizens involves "seizures" of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a "seizure" has occurred.

Terry v. *Ohio*, *supra*, 392 U.S. at 19 n.16. The test that has generally been applied to distinguish consensual encounters from seizures subject to the Fourth Amendment is whether "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States* v. *Mendenhall*, 446 U.S. 544, 554 (1980) (opinion of Stewart, J.); *United States* v. *West*, 651 F.2d 71, 72 (1st Cir. 1981), petition for cert. pending No. 81-307 (filed Aug. 14, 1981); *United States* v. *Patino*, 649 F.2d 724, 726-727 (9th

Cir. 1981); *United States* v. *Elmore*, 595 F.2d 1036, 1041-1042 (5th Cir. 1979), cert. denied, 447 U.S. 910 (1980); *United States* v. *Wylie*, 569 F.2d 62, 68 (D.C. Cir. 1977), cert. denied, 435 U.S. 944 (1978); *State* v. *Reid*, 276 S.E. 2d 617, 621 (Ga.), cert. denied, No. 81-1807 (Oct. 5 1981), on remand from 448 U.S. 438 (1980); see also *United States* v. *Harrison*, No. 81-5042 (4th Cir. Jan. 7, 1982), slip op. 5-6. *United States* v. *Price*, 599 F.2d 494, 498 (2d Cir. 1979). This is essentially the test invoked by the court below to distinguish an arrest from a more limited seizure. By misapplying this test, the court below effectively rejected this Court's repeated holding that not all seizures require a showing of probable cause.

Plainly, probable cause is not required to justify a police-citizen encounter whenever a reasonable person in the citizen's position would think himself not free to leave, for if there exists no objective basis for believing that there has been a forcible detention, there would be no seizure subject to the Fourth Amendment at all. Rather, an arrest requiring probable cause is to be distinguished from an investigative detention by reference to the purpose and duration of the detention as well as the procedures which accompany the detention. In *Michigan* v. *Summers*, *supra*, slip op. 8, the Court recognized the "general rule that every arrest, and every seizure having the essential attributes of a formal arrest, is unreasonable unless it is supported by probable cause." Yet the Court upheld the detention of an individual—who was indisputably not free to leave—during the lawful search of his home, stating (*ibid.*):

> [T]he exception for limited intrusions that may be justified by special law enforcement interests is not confined to the momentary, on-the-street detention accompanied by a frisk for weapons involved in *Terry* [v. *Ohio*, 392 U.S. 1 (1968)] and *Adams* [v. *Williams*, 407 U.S. 143 (1972)].

The Court explained (slip op. 8, n.12):

> If the purpose underlying a *Terry* stop—investigating possible criminal activity—is to be served, the police must under certain circumstances be able to

> detain the individual for longer than the brief time period involved in *Terry* and *Adams*.

And the Court distinguished between searches and seizures requiring a probable cause predicate and other lesser intrusions by reference to "the character of the official intrusion and its justification." Slip op. 9.

The Court also quoted with approval Professor La Fave's recitation of examples of investigative techniques that may justifiably be carried out under the rubric of an investigative detention based upon founded suspicion. *Ibid.*, quoting 3 W. La Fave, *Search and Seizure* § 9.2, at 36-37 (1978). Professor La Fave's summary of the governing principle concludes that the permissibility of extending a *Terry* stop should turn on "[w]hether the police are diligently pursuing a means of investigation which is likely to resolve the matter one way or another very soon and whether it is rather essential to the investigation that the suspect's presence be continued during that interval." *Id.* at 40.

The criteria for a valid investigative detention are fully satisfied on the present record. Once Officers Johnson and Magdalena had observed that respondent was traveling under a false name and recognized that respondent had lied in explaining the discrepancy in names,[12] they reasonably decided to seek respondent's consent to a search of his suitcases. Examination of respondent's luggage was calculated to resolve promptly the accuracy of their suspicion and to precipitate either his release or his arrest, for if respondent's luggage had not contained contraband it seems clear that he would have been free to go.[13] The entire encounter between the police and respondent from their first approach until respondent's arrest lasted no more

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[12] The identity between the name respondent placed on his luggage tags and that on the airline ticket revealed the falseness of his explanation that a friend had purchased the airline ticket for him.

[13] It does not matter that respondent might have refused consent to the search. Plainly the officers had a right to attempt to secure such consent—a procedure which took only a few moments. Of course, if respondent had refused consent and nevertheless been further detained, a different question would be presented.

than 10 to 15 minutes (Tr. 31). And precisely because respondent's consent to a search of the luggage was to be sought, his presence was obviously essential to the investigation.

2. Contrary to the District Court of Appeal's suggestion (Pet. Supp. App. 50), *Dunaway* v. *New York*, 442 U.S. 200 (1979), provides no support for the conclusion that the events that transpired here amounted to an arrest requiring probable cause. In *Dunaway*, police, acting on information (not amounting to probable cause) that implicated Dunaway in a murder, went looking for him and, after locating him at a neighbor's house, placed him in a police car and brought him to a police station without his consent. There, after being given *Miranda* warnings, Dunaway was interrogated in a custodial situation for a period of an hour, at which point he confessed to the crime. Although Dunaway had not been formally arrested and charged with a crime, the Court held that his detention without probable cause was unlawful because it was "in important respects indistinguishable from a traditional arrest." 442 U.S. at 212. In support of this characterization the Court noted the extended interrogation to which Dunaway was subjected, the involuntary transfer to the police station, and the use of an interrogation room, as well as the fact that he was not told he was free to go and in fact would not have been allowed to depart had he attempted to do so. Mr. Justice White concurred (442 U.S. at 219-220) noting that the Court's opinion should not be read to limit investigative detentions on less than probable cause to the facts of *Terry* v. *Ohio* and stressing that the similarity between the procedures used and a traditional arrest explained the result.

This case is readily distinguishable. First, the trial court in this case apparently found that, unlike Dunaway, respondent consented to the initial contact with police and to the ensuing move to the "office" in the stewardesses' lounge. In holding that the consent to search was tainted by an illegal arrest, the en banc appellate court never addressed the trial court's finding that the entire course

of conduct leading up to the search was consensual.[14] This consent undercuts any claim that the respondent had been arrested by the time he consented to the search of his luggage. *United States* v. *Mendenhall*, *supra*, 446 U.S. at 557-558. But even if the move to the office is assumed to have been non-consensual, there was nothing like an arrest here. First, the duration of the interview in this case was much briefer than that in *Dunaway*. Moreover, while the interrogation in *Dunaway* ended after an hour with Dunaway's confession, there was every indication that it would have continued indefinitely had Dunaway not incriminated himself. Nor did the interview here resemble a custodial interrogation. Indeed, the officers' purpose in walking with respondent to their airport quarters was not to secure information from him but simply, if he agreed to it, to carry out a consent search of his luggage under conditions that would spare respondent unnecessary embarrassment.

The setting here, too, was less suggestive of an arrest—a makeshift facility close to public areas of the airport with none of the provisions for security commonly associated with a police station. In sum, the shift of location from the airport concourse to the nearby lounge here carried no suggestion of arrest. Respondent could not reasonably have believed that, absent some further developments, he was going to be charged with a crime or even detained for any extended period of time. By contrast, the involuntary transfer of Dunaway in a police car from a neighbor's home to a police station had all the earmarks of an arrest.[15]

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[14] In light of the arguments made in the trial court, we interpret the court's rather conclusory finding of consent (see page 5, *supra*) to mean that the entire sequence of events up to and including the consent to search was consensual. If the Court deems the trial court's finding insufficiently clear, a remand for further proceedings may be warranted.

[15] The Court has on several occasions recognized that an individual may properly be asked to make some movement from a point at which he has encountered law enforcement officers for reasons of safety and convenience without requiring that the officers

3. Finally, we turn to the factual considerations noted below in support of the conclusion that respondent had been arrested. The court first noted the confined quarters to which respondent was removed in the company of two police officers (Pet. Supp. App. 47-48).[16] But it is readily apparent that these makeshift quarters in no respect resembled a cell or interrogation room and were devoid of any equipment other than that which might be found in any office (Tr. 27). Officer Johnson explained the absence of "police paraphernalia," noting that "it wasn't an area we could really secure very well" (*ibid.*). The most striking quality of these quarters was their lack of resemblance to a police station; plainly they were adopted purely for convenience. In short, there was nothing about this setting that served to transmute into an arrest what was otherwise at most an investigative detention.

The second factor cited by the District Court of Appeal—that the officers told respondent of their suspicions—is equally inadequate to justify the arrest label applied. This fact does nothing to distinguish the encounter from an investigative detention. Indeed, contrary to the inference drawn by the court, by identifying the nature of his suspicion Officer Johnson made it plain that it was merely a suspicion that he entertained, that no charges were being lodged in any formal sense, and that by consenting to a search the respondent might have the opportunity to dispel that suspicion, thereby terminating the investigation.[17]

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be able to adduce any greater reason for suspicion than that which occasioned the stop originally. See, *e.g.*, *Michigan* v. *Summers*, *supra*, slip op. 10 n.16, 13; *Pennsylvania* v. *Mimms*, 434 U.S. 106, 109-111 (1977); *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 560 (1976).

[16] We note that respondent was left alone with Officer Magdalena at the time Officer Johnson went to retrieve the luggage (Tr. 42).

[17] Officer Johnson recounted his statement to respondent (Tr. 28):

> To be the best of my recollection, it was something to the effect that we suspected that he was carrying narcotics, and that we would like him to open the suitcases to allow us to see what was in them to dispel that suspicion or to confirm that suspicion.

From the perspective of a person not carrying contraband, it would thus have been absolutely clear that there was no arrest here. The situation in this respect contrasts sharply with that in *Dunaway*.

Another factor singled out by the en banc appellate court—the agents' control of respondent's luggage and his ticket (Pet. Supp. App. 48) is again entirely insufficient to convert the encounter from a *Terry* stop to an arrest. First, as is noted above (page 3 note 4), it is by no means clear that the officers secured respondent's luggage before obtaining his consent. And even if they did, that would in no respect alter the fundamental character of the encounter. Certainly if, as we argue below (see page 30 note 27, *infra*), there was by this juncture reasonable suspicion justifying a brief detention of respondent for the purpose of seeking his consent to a search of the suitcase, it was *a fortiori* reasonable to secure the suitcases themselves so as to make it possible to search them if consent was forthcoming. The detention of the suitcases prior to securing respondent's consent to their search, if it indeed occurred, lasted only a matter of moments.[18] Because the officers promptly made

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[18] This case thus does not present a question comparable to that presented in *United States* v. *West*, *supra*, 651 F.2d at 74, petition for cert. pending No. 81-307 (filed Aug. 14, 1981), where narcotics agents detained a suitcase for a period of one hour pending the arrival of a narcotics detecting dog because they reasonably suspected that the suitcase contained narcotics. There the defendant had refused consent to search of his luggage and had been allowed to proceed on his way while his bags were detained. The instant case is distinguishable by the extreme brevity of any detention of luggage, the limited purpose served, and the fact that absent respondent's consent to the search no significant intrusion upon respondent's privacy or possessory interests in his luggage would have been effected. There is no reason to conclude that respondent's consent to search was a product of the retrieval of his luggage. We note that the court below did not hold that the momentary detention of respondent's luggage itself violated any Fourth Amendment right or that the consent to search was a fruit of such a violation. Rather, the court viewed the retrieval of the luggage as an indica-

it clear to respondent that the purpose of retrieving his luggage was to make it possible for them to search it if he consented, the retrieval of the luggage underscores, rather than contradicts, the limited character of the contact between police and respondent. The retrieval of the luggage accordingly did not convert the situation into an arrest.

The officers' retention of respondent's airline ticket is also no more probative of an arrest than the other factors discussed above. It may be that the officers' failure immediately to return respondent's ticket lends support to the conclusion that he was at some point seized (but see note 27, *infra*), but the ticket was never removed from respondent's presence, and the officers' custody of it in no way implied that the interview of respondent was tantamount to lodging of a criminal charge, or that his detention would not end upon completion of the brief planned course of investigation.

A final factor adduced by the court below in support of its conclusion that respondent had been arrested was the State's apparent concession at oral argument that the officers would not have allowed respondent to leave the makeshift office if he had sought to do so (Pet. Supp. App. 50). This concession is not supported by anything in the record, and it is thus simply impossible to say what the subjective intentions of Officers Johnson and Magdalena were. In any event, those subjective intentions are irrelevant, for there is no indication that any such intentions were communicated to respondent. *Scott* v. *United States*,

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tion that respondent had been arrested—a conclusion we think entirely unfounded for the reasons stated in the text.

We note that the Second Circuit's recent decision in *United States* v. *Place*, 660 F.2d 44 (1981), conflicts with the First Circuit's *West* decision with respect to the lawfulness of the detention of luggage. The Second Circuit has declined to reconsider its decision en banc, and we intend to seek this Court's review of the decision in *Place*. As explained above, however, there is no occasion to consider here whether a detention of luggage of the sort involved in *West* and *Place* is permissible based upon reasonable suspicion.

436 U.S. 128, 136-137 (1978); *United States* v. *Mendenhall*, *supra*, 446 U.S. at 554 n.6 (opinion of Stewart, J.). Moreover, the State's concession is inapposite to the inquiry at hand, for even assuming the officers planned to detain respondent, if he sought to leave, until they had ascertained whether he would consent to a search of his bags, that shows only that he would have been seized, if necessary, and not that he was seized. Furthermore, to the extent the officers' subjective intentions may be considered, they bear only upon whether there was a seizure of some kind and not on whether the seizure was an arrest.

In sum, there is nothing in the record that supports the District Court of Appeal's conclusion that respondent had been subjected to an arrest or its functional equivalent at the time he consented to the search of his suitcases. The contraband uncovered is thus not suppressible as the fruit of an unlawful arrest.

II. RESPONDENT WAS NOT UNLAWFULLY SEIZED BY THE DADE COUNTY POLICE OFFICERS

Thus far we have argued that respondent was not under arrest or subject to a functionally equivalent form of detention requiring a probable cause predicate at the time he agreed to the search of his luggage. If the Court agrees with our submission, it may simply remand the case to the Florida courts for any further proceedings. Alternatively, however, the Court may deem it appropriate to address some of the remaining issues in this case, which may be urged as alternative grounds for affirmance or arise upon remand, so as to provide guidance for the courts below. That course may be particularly appropriate because the opinion under review gives reason to believe that the court below is disposed to an erroneous view of the law that would apply on remand. We address those issues in the remaining sections of this brief.

Assuming that respondent was not arrested at any point prior to the search, the question may arise whether he was subject to any lesser intrusion regulated by the Fourth Amendment, and if so, whether the necessary

predicate for that police conduct existed.[19] It is our threshold contention that respondent was not seized within the meaning of the Fourth Amendment during the initial encounter with police. Alteratively, we contend that if a seizure technically occurred, the intrusion effected was so modest as to be reasonable in light of the grounds for suspicion known to the officers at the time they contacted respondent. Finally, we argue that the second phase of the encounter, in which respondent accompanied the officers to their makeshift office, was either a continuation of a consensual encounter, or at most a time-limited investigative detention justifiable in light of the additional grounds for suspicion established in the first phase of the interview.

At the outset, we note the significant parallels between this case and *Mendenhall*. In *Mendenhall* the Court considered an airport encounter between agents of the federal Drug Enforcement Administration and an individual suspected of transporting narcotics that was in many respects similar to that at issue here (see 446 U.S. at 547-549). The Court held that the initial approach of the agents to Mendenhall, and their request for identification and her airline ticket, did not constitute an unlawful seizure (*id.* at 557). Justices Stewart and Rehnquist concluded that the encounter did not constitute a seizure subject to the Fourth Amendment at all, explaining (*id.* at 553):

> We adhere to the view that a person is "seized" only when, by means of physical force or a show of authority, his freedom of movement is restrained.

Justice Powell, joined by the Chief Justice and Justice Blackmun, did not reach the question whether Mendenhall had been seized because the government had not argued the contrary in the lower courts, which had accordingly assumed that a seizure occurred. *Id.* at 560. They noted,

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[19] Although respondent's counsel's argument on the motion to suppress is not entirely clear, it appears that he did argue (Tr. 68-69) that even if he was not arrested, respondent was seized unlawfully at some point.

however, that they did not necessarily disagree with Justice Stewart's analysis. See also *Reid* v. *Georgia*, 448 U.S. 438, 442-443 (1980) (Powell, J., concurring). On the merits, the concurring Justices concluded that, even assuming Mendenhall had been seized when approached by the DEA agents, the intrusion was so modest as to be reasonable in light of the grounds for suspicion known to the agents. 446 U.S. at 565. As will be evident, our argument applies, in turn, the analysis employed by Justice Stewart and that employed by Justice Powell.

A. Respondent Was Not Seized Within The Contemplation Of The Fourth Amendment When Dade County Police Officers Approached Him And Asked If He Would Show Them His Airline Ticket And Identification

The issue addressed in Justice Stewart's opinion in *Mendenhall*—the standards by which it is to be determined whether an encounter between law enforcement officers and an individual whom they may suspect of wrongdoing constitutes a "seizure" of the person rendering the encounter subject to the Fourth Amendment—is one of great practical importance. In the course of discharging his law enforcement and community caretaking responsibilities, the conscientious police officer is (and properly should be) constantly alert to events or behavior that indicate some possibility that violations of law are taking place. Usually the initial basis for suspicion will not amount to probable cause, and often it will not constitute the degree of reasonable suspicion necessary to justify any kind of forcible detention of the individual. At the same time, the only available means of investigating the suspicion will often be through inquiry of the individual, which in some significant proportion of instances will lead to the discovery of further information ultimately resulting in the apprehension of a criminal or the prevention of a crime. We find it hard to imagine that a rational set of rules would require the officer to shrug his shoulders and walk away in such circumstances,

rather than making contact with a suspect in order to pursue the inquiry.

As in *Mendenhall* and in the instant case, a salient characteristic of such investigatory encounters will often be their ambiguity: the officer will say nothing regarding the individual's freedom to walk away, and the individual will not inquire. At heart, then, the legal inquiry into whether such an encounter constitutes a Fourth Amendment seizure will often turn on the choice of a presumption in favor of or against the conclusion that an encounter, without more, constitutes a seizure. We submit that this Court has already decided this question in favor of the view that an encounter will be presumed not to be a seizure in the absence of affirmative evidence to the contrary. Thus, as the Court stated in *Terry*, "[o]nly when the officer, *by means of physical force or show of authority*, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." 392 U.S. at 19 n.16 (emphasis supplied).[20] See also *Sibron* v. *New York*, 392 U.S. 40, 63 (1968) ("show of force or authority which left [the individual] no choice"); cf. *Adams* v. *Williams*, *supra*, 407 U.S. at 146 n.1.

As Justice Stewart aptly summed up the controlling principles in *Mendenhall* (446 U.S. at 554-555; footnotes and citations omitted):

> [A] person has been "seized" within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some

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[20] Justice White added, in a concurring opinion, that "[t]here is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets." 392 U.S. at 34. Justice Harlan, too, noted that a policeman has the same right as any other citizen to pose questions of others, so long as the individual addressed retains his ordinary freedom to decline to satisfy his questioner. *Id.* at 32-33.

> physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. * * * In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person.

This test has been adopted by all of the federal courts of appeals to address this question (see pages 10-11, *supra*), and the courts have generally concluded upon facts similar to those persented here that no seizure has been effected. See, *e.g.*, *United States* v. *Wylie*, *supra*, 569 F.2d at 68 ("what a reasonable man innocent of any crime would have thought had he been in defendant's shoes"); *United States* v. *West*, *supra*; *United States* v. *Setzer*, 654 F.2d 354, 358 (5th Cir. 1981), *United States* v. *Berry*, 636 F.2d 1075 (5th Cir. 1981), rehearing en banc granted, 649 F.2d 385 (11th Cir. 1981); but see *United States* v. *Patino*, *supra*,

Here, as in *Mendenhall*, no seizure occurred when the officers approached respondent. Indeed, the pattern of the two encounters is strikingly similar—a fact we ascribe to professional police training.[21] Just as in *Mendenhall* (446 U.S. at 555):

> [T]he events took place in the public concourse. The [officers] wore no uniforms and displayed no weapons. They did not summon the respondent to their presence, but instead approached [him] and identified themselves as [police officers]. They requested but did not demand to see the respondent's identification and ticket.

Tr. 25-26, 31-32, 34. Although the officers did not expressly state that respondent was free to leave, that was

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[21] The DEA Manual stresses that agents who entertain a suspicion that they believe may be insufficient to justify an investigatory detention must not demand anything of a suspect, must not say or do anything that would foster the impression that cooperation is required, must not move anywhere with a suspect without his consent, and generally must not create the impression that the suspect is not free to leave. DEA Manual 129-131.

not essential to a finding that the encounter was consensual. *United States* v. *Mendenhall*, *supra*, 446 U.S. at 555 (opinion of Stewart, J.); *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 227 (1973). Because the officers at all times proceeded in a conversational manner containing no manifestation of an authoritative demand, the absence of an express disavowal of any such demand is not significant.

On this threshold issue of the existence of a Fourth Amendment seizure of the defendant's person, the burden of proof is properly placed upon the defendant.[22] In the present case, respondent has not identified, and indeed the record does not appear to contain, any evidence of behavior by the officers—let alone the use of "physical force or show of authority" that is the stated benchmark of a "seizure"—from which he could reasonably have concluded that he was not free to leave. Respondent himself testified solely to his subjective reaction to the encounter: that because he had been approached by police officers, he did not feel free to refuse to cooperate with their inquiry (Tr. 52). But whether an encounter is or is not a seizure regulated by the Fourth Amendment cannot properly turn upon the subjective beliefs or characteristics of a suspect, matters than are unknowable to the officers and therefore would result in precisely the same objective conduct having varying and unpredictable legal consequences. Indeed, this Court has consistently recognized that this kind of question is in fact governed by an objective standard. *E.g.*, *Scott* v. *United States*, *supra*, 436 U.S. at 136-137; *Terry* v. *Ohio*, *supra*, 392 U.S. at 21-22.

In so saying, we do not doubt that the socialization of many members of our society promotes in them an atti-

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[22] If, as the Court has held, "[t]he proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by [a] challenged search or seizure," *Rakas* v. *Illinois*, 439 U.S. 128, 131 n.1 (1978) (citations omitted), it necessarily follows that the proponent of suppression must show that a seizure implicating the Fourth Amendment in fact occurred.

tude of cooperation with law enforcement authorities that would render it psychologically difficult to refuse even the most politely framed police inquiry. Nor do we question that persons such as respondent, approached in the midst of commission of a serious crime, will often be prompted by feelings of guilt or anxiety to cooperate with police inquiries, even to the point of confessing or consenting to a search that they know will reveal evidence of their illegal activity. Both types of reactions are commonplace, and both are of great utility to law enforcement efforts. But so long as the impetus for cooperation springs from the individual's socialization and psychological makeup, and is not induced by behavior of the officers that demands cooperation even from those not internally disposed to it, there is no justification for bringing the restrictions of the Fourth Amendment to bear. *Schneckloth* v. *Bustamonte*, *supra*, 412 U.S. at 234 n.15; *Coolidge* v. *New Hampshire*, 403 U.S. 443, 488 (1971); see also *United States* v. *Washington*, 431 U.S. 181, 187-188 (1977); *Miranda* v. *Arizona*, 384 U.S. 436, 477-478 (1966) ("It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement.")[23]

If the presence of a Fourth Amendment seizure is to be determined with reference to the subjective motives of the individual for cooperation, or on the basis of presumptions that suspects would not voluntarily cooperate with police inquiries but would do so only in submission to an assertion of authority, the result would be to convert most police-suspect encounters into "seizures" requiring specific, articulable suspicion of criminal activity. Such a result would place a damaging and entirely unwarranted burden upon law enforcement, for it makes no allowance for the progressive accumulation

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[23] Discussing *Coolidge*, the Court in *Schneckloth* noted (412 U.S. at 234 n.15, quoting 403 U.S. at 488):

> We found nothing constitutionally suspect in the subjective forces * * * impell[ing] coopera[tion] with the police. 'Among those are the simple but often powerful convention of openness and honesty * * *.'

of evidence that in many situations represents the only means by which suspicion amounting to probable cause may be established, and criminal activity detected or prevented. Recognition of this principle lies behind the rule of *Terry* and its progeny recognizing the permissibility of limited investigative detentions on less probable cause. Similar considerations dictate that objectively noncoercive encounters between police and citizens (including those suspected of criminal activity) be allowed without demonstration of any particular level of suspicion as a predicate.[24]

B. Even If The Initial Encounter With Respondent Constituted A Fourth Amendment Seizure Of His Person, It Was Justified By Reasonable Suspicion Of Criminal Activity

As noted above, this Court has repeatedly held that police may detain a person for investigative purposes not tantamount to an arrest on the basis of reasonable suspicion that he is engaged in criminal activity that does

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[24] We note, however, that contacts made by drug enforcement agents are far from random. See pages 25-30, *infra*. Agents participating in the DEA's airport surveillance program and others receiving DEA training (see note 1, *supra*) are instructed that "[y]ou may contact a suspect only when you have *some* suspicion that he is involved in criminal activity" (DEA Manual 125) and that "[y]ou must be able to articulate *some* facts" that precipitated the contact. *Id.* at 126; emphasis in original. Although comprehensive statistics reflecting the outcome of contacts initiated by DEA agents are unavailable at this time, the restraint which governs the operation of the program is revealed by evidence in some of the cases which have arisen from it. For instance, in *United States* v. *Garcia*, 450 F. Supp. 1020, 1022 (E.D.N.Y. 1978), the defendant was the only individual contacted in a day of surveillance at New York's busy La Guardia airport. Available data concerning the outcome of searches authorized by travelers contacted substantiates the conservative approach taken by agents. In the first 18 months of surveillance at the Detroit Airport, 96 encounters involving 141 persons led to 77 discoveries of narcotics and 122 arrests. *United States* v. *Mendenhall*, *supra*, 446 U.S. at 562 (opinion of Powell, J.), citing *United States* v. *Van Lewis*, 409 F. Supp. 535, 539 (E.D. Mich. 1976), aff'd, 556 F.2d 385 (6th Cir. 1977). See also DEA Manual, 2-3.

not meet the standard of probable cause. *Michigan* v. *Summers*, *supra*, slip op. 6-9 (collecting cases). The cases establish three considerations to be weighed in determining the reasonableness of an investigative detention: "(i) the public interest served by the seizure, (ii) the nature and scope of the intrusion, and (iii) the objective facts upon which the law enforcement officer relied in light of his knowledge and expertise." *United States* v. *Mendenhall*, *supra*, 446 U.S. at 561 (opinion of Powell, J.; citations omitted).

Little need be said to establish the compelling public interest served by airport surveillance for drug couriers. As explained by Justice Powell in *Mendenhall* (446 U.S. at 561-562) there are few law enforcement activities more essential to the well-being of our society. The high priority assigned to this matter by the federal government, which was noted in *Mendenhall*, continues to this date and explains our interest in this case. A holding that requires a high level of suspicion for the kind of minimally intrusive police inquiry involved in the initial questioning of respondent and that discredits reliance upon the kinds of subtle factors that have proved reliable to trained agents in the special context of airport drug courier detection would have a grave adverse impact upon what has proven to be one of the most successful programs for interdicting this nation's illicit drug traffic.

Turning to the second factor cited in Justice Powell's opinion in *Mendenhall*, the nature and scope of the intrusion, the initial police contact in this case, if a "seizure" at all, was the mildest sort of infringement upon respondent's liberty imaginable. It involved no actual or overtly threatened physical restraint, the inquiry was made in a polite and unobtrusive conversational manner and entailed no public embarrassment, and it was of very brief duration (especially prior to the development of additional information strengthening the officers' suspicions). The parallels between the instant case and *United States* v. *Martinez-Fuerte*, 428 U.S. 543 (1976), are especially instructive. Both cases involved the activities of specially trained law enforcement officers

dealing with a specific and serious law enforcement problem at a location that was a relatively focused point for the particular activity under investigation. In both cases the agents were confronted with the task of singling out from a relatively large universe of innocent travelers a small group of offenders. In *Martinez-Fuerte* the Court not only sanctioned routine interference with all motorists passing the checkpoint, but, most relevant here, permitted the officers to single out certain motorists for a stop of longer duration at a secondary inspection station on the basis of factors that concededly would not have constituted reasonable suspicion of alien smuggling activity in other contexts, justifying this result in large part on the basis of the very limited nature of the intrusion. *Id.* at 563. In this case, the intrusion is no greater than in *Martinez-Fuerte*, but the level of individualized suspicion is substantially stronger.

This brings us to the third factor in the analysis—the basis for the officers' suspicions. Whatever might be said about the substantiality of the facts observed by the officers here as a basis for justifying a more intrusive seizure in a setting different from and less specialized than the airport drug interception effort, the officers' actions in this setting were well justified. Among the facts that supported the officers' suspicion were respondent's extreme nervousness, his particular concern for his luggage, his scrutiny of others suggesting he was trying to ferret out surveillance, his use of cash from a large roll of bills to pay for his ticket, and his failure to completely fill in the required baggage labels.

The District Court of Appeal stressed its view that these traits may commonly be associated with innocent behavior (Pet. Supp. App. 39-41). That observation wholly fails to support the conclusion drawn from it; if the facts observed were consistent with criminal behavior only, they would supply probable cause. In any event, these facts are not to be regarded in isolation but in conjunction, in light of the special setting in which they arose, and through the trained eyes of an airport drug surveillance detective. *United States* v. *Cortez*, 449 U.S.

411, 418-420 (1981); *United States* v. *Mendenhall*, *supra*, 446 U.S. at 563-565 (opinion of Powell, J.); *United States* v. *Brignoni-Ponce*, *supra*, 442 U.S. at 884-885. Viewed in this manner, even conduct that might appear "wholly innocent to the untrained observer" may create an articulable basis for suspicion when viewed by a trained officer. *Brown* v. *Texas*, 443 U.S. 47, 52 n.2 (1979).

Although the evidence relied upon by the officers here is subtle, it is not to be disregarded. As the statistics cited in *Mendenhall* (446 U.S. at 562) reveal, these factors, which along with others have been compiled into an informal drug profile used in one form or another by federal agents and many state agents, have proven a powerful indication of criminal drug smuggling activity. Moreover, it is simply unrealistic to expect professional drug couriers to give themselves away in any more blatant fashion. To require police to disregard such subtle clues is to discard what may be the only effective means of combatting drug smuggling accomplished through commercial air transportation. In view of the extremely limited intrusion involved, the grounds for suspicion available to the officers here should be held a sufficient predicate for any "seizure" associated with the initial questioning of respondent.

In suggesting a contrary conclusion, the court below stated that Officer Johnson's claim that he could differentiate ordinary flight anxiety from the nervous behavior typically exhibited by a drug courier "must be completely disregarded" (Pet. Supp. App. 40 n.4). We cannot overemphasize the extent of our disagreement with the court below, which ridiculed this element of the officers' observations as "amateur forensic psychiatry" (*ibid.*). In our view, it defies common sense to suppose that officers who have spent months or years observing tens of thousands of air travelers passing through airports would not be able to distinguish between the type of nervousness manifested by persons who fear apprehension for criminal activity and that exhibited by persons who fear air travel, are worried about missing

a connecting flight, or are concerned about some other commonplace and innocent anxiety associated with air travel. In this connection, we note that most drug couriers are aware of the existence of courier detection programs at airports, so that their movement of illicit drugs through airports must be a time of extraordinarily high anxiety for them; it would be astonishing if this anxiety were not often manifested by visible symptoms of "nervousness" that, although often subtle, are nevertheless reliably detectable by a trained or experienced observer. Indeed, the findings of modern science confirm that there is an extensive "body language" consisting of non-verbal and largely unconscious communication that all of us "speak" and understand. See, *e.g.*, G. Lindzey, C. Hall & R. Thompson, *Psychology* 424-425 (2d ed. 1978); J. Fast, *Body Language* (1970); P. Farb, *Word Play* 231-247 (1973).

Thus, any rule that tells airport surveillance agents that they must disregard observations of nervousness that in their experience is typical of drug courier activity would deprive them of perhaps the single most useful and reliable factor for singling out suspicious individuals for further investigation. It would also conflict with decisions of this Court that recognize that a trained police officer is a professional observer of criminal conduct who can often see meaning where an untrained lay person would not. *United States* v. *Cortez*, *supra*, 449 U.S. at 418; *Brown* v. *Texas*, *supra*, 443 U.S. at 52 n.2; *United States* v. *Brignoni-Ponce*, *supra*, 422 U.S. at 885.[25]

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[25] We note that the observation of characteristic nervousness by a trained officer is not less objective simply because it is difficult to describe. It is real, visible behavior that could be recognized as indicative of possible drug courier activity by others if, for example, a film of the suspect's behavior were available. Moreover, in this particular case, contrary to the suggestion of the court below, the officers' suspicion did focus upon two objective articulable facts relating to respondent's physical expression of nervousness. First,

The conclusion we espouse is not inconsistent with *Reid* v. *Georgia*, 448 U.S. 438 (1980). The facts found insufficient there to establish reasonable suspicion were less probative of criminal conduct than those described here. As the Court indicated in Reid (*id.* at 441), the facts observed there "describe a very large category of presumably innocent travelers." That observation would not apply to the basis for the police contact here. Particularly significant, in our judgment, is the officer's recognition of furtive conduct typical of a drug courier. More importantly, the intrusion at issue in *Reid* assumed significantly greater proportions than that at issue here, for there the DEA agents stopped arriving passengers who had already left the terminal. The initial interrogation yielded no further incriminating information, yet the defendants were asked to return to the terminal and submit to a search. The greater intrusion presumed to have occurred in *Reid*[26] may also have influenced the Court's conclusion that there was insufficient suspicion to justify it.[27]

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respondent's luggage appeared to be a special object of concern. Second, respondent appeared to be unusually concerned about who might be watching him. Viewed in conjunction, these facts tend to corroborate the officers' suspicion sufficiently to justify their initial approach to respondent.

[26] The Court in *Reid* did not decide whether the contact was purely consensual. 448 U.S. at 443 (Powell, J., concurring).

[27] Assuming that the initial contact was lawful, it is plain that respondent was not unlawfully seized when he accompanied the police officers to their office. First, the trial court evidently found that the respondent voluntarily consented to accompany the agents to their office. As explained above (pages 23-24), respondent's testimony that he felt obliged to honor the officers' requests is not inconsistent with a finding of voluntary consent because there is no indication that the officers' conduct induced this feeling in respondent. Even if respondent was seized at this juncture, the seizure was lawful, for by then the officers had assuredly acquired reasonable suspicion of illegal activity based upon respondent's use of a false name and his proffering of a false story to explain the use of the alias.

CONCLUSION

The judgment of the District Court of Appeal of Florida should be reversed.

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